

ECAGWAYA OR TRADITIONAL ADOPTION IN TRIBAL COURT SELF-HELP GUIDE

This page explains what an Ecagwaya or traditional adoption is, how to start an adoption, how to get a hearing, how to prove the allegations in the petition and the legal consequences of an adoption. It also explains how a natural parent can object to the adoption.

WHAT IS AN ECAGWAYA OR TRADITIONAL ADOPTION

Tribal law allows for traditional adoption. An Ecagwaya or traditional adoption means according to Tribal custom, the natural parents placed the child(ren) with another family without court involvement for a period of at least two (2) years and the adoptive parents have filed a petition for traditional adoption with the court. In a traditional adoption, the parental rights of the natural parent may or may not be terminated.

An adoption is a legal process whereby the legal rights and duties of children are given to the adopting parents. After an adoption is finalized, the adopted child will be regarded and treated in all respects as the natural child of the adoptive parents, and the adoptive child and the adoptive parents will maintain the legal relationship of parent and child and shall have such rights and responsibilities as are ordinarily present in such relationships.

In an Ecagwaya or traditional adoption the natural parents parental rights to the children may or may not be terminated. The Court, in its discretion, on a case by case basis, will resolve any questions that arise over the parental rights of the natural parent and the adoptive parent(s) in this custom adoption. The decision of the Court concerning parental rights will be based on the best interests of my child(ren) and on recognition of where the child(ren)'s sense of family is. If the natural parent(s)' parental rights are terminated by the court, the natural parent will no longer be considered the parent of any of the adoptive child(ren) and they will no longer have any parental control or rights to the child(ren).

If a natural parent wants to maintain some parental rights they need to appear at the adoption hearing and present evidence that it would be in the child(ren)'s best interest the parental rights of the natural parent(s) should not be terminated.

JURISDICTION

The RST Juvenile or Children's Court has jurisdiction to hear a petition for adoption involving any Indian child whose domicile or actual residence is within the boundaries of the Rosebud Sioux Tribe Reservation or within Indian Country (trust land or communities) of the original boundaries of the reservation or where jurisdiction is conferred on the tribal court by the Federal Indian Child Welfare Act.

AGE REQUIREMENT OF CHILD AND ADOPTIVE PARENT

The adoption code requires that the child to be adopted must be younger than 18 years of age. A child under the age of 18 can be adopted by an adoptive parent who must be at least ten (10) years older than the child. If the child to be adopted is 12 years old then the adoptive parent must be at least 22 years of age.

CONSENT OF CHILD OVER THE AGE OF 12

The adoption code requires any child at least 12 years old or older give their written consent to be adopted. Consenting to the adoption means that the child agrees to the adoption and agrees to the adoptive parents to be considered the adoptive child's legal parents. This is ordinarily done after the court examines the child(ren) to be adopted at the adoption hearing and if the court is satisfied that the child consents to the adoption the child will sign the written consent in front of the court.

CONSENT OF NATURAL PARENTS

The code mandates that no child can be adopted without the consent of both natural parents. The code also gives some exception to the consent requirement. Consent of a natural parents is not necessary if the adoptive parent can prove one of the following: (1) the natural parent's parental rights have been terminated by a court; (2) the natural parent has been adjudged by a court of competent jurisdiction to be mentally incompetent or mentally ill; or (3) the natural parent has abandoned their child(ren) for a consecutive period of one year from the date of filing the petition for adoption.

If either natural parent consent to the adoption and do not want to appear at the adoption hearing, that parent or both can use the **Consent to Adoption and Power of Attorney** form. This document allows the natural parent who does not wish to appear at the hearing the ability to consent to adoption and make their appearance in writing without being physically present at the hearing. This form is only to be used if one of the natural parents (mother or father) of the child(ren) petitioner(s) are seeking to adopt is going to consent. Do not use this form unless one or both parents consent. Make two (2) copies of this form (one for each parent to sign) if both parents consent. If petitioner(s) have the natural parents consent when petitioner(s) file the petition, petitioner(s) can file the consents by attaching any consent form to the petition. If the petition is already filed when written consent is executed petitioner(s) can file the consent with the court any time or at the hearing.

In an Ecagwaya or traditional adoption the natural parents parental rights to the children may or may not be terminated. The Court, in its discretion, on a case by case basis, will resolve any questions that arise over the parental rights of the natural parent and the adoptive parent(s) in this custom adoption. The decision of the Court concerning parental rights will be based on the best interests of my child(ren) and on recognition of where the child(ren)'s sense of family is. If the natural parent(s)' parental rights are terminated by the court, the natural parent will no longer be considered the parent of any of the adoptive child(ren) and they will no longer have any parental control or rights to the child(ren).

If a natural parent wants to maintain some parental rights they need to appear at the adoption hearing and present evidence that it would be in the child(ren)'s best interest the parental rights of the natural parent(s) should not be terminated.

If the natural parent(s) and the adoptive parent(s) request that the natural parents retain some parental rights, the court will consider that request but the outcome depends on what is in the best interest of child(ren).

FIRST CAVEAT: THERE IS A WAITING PERIOD BEFORE THE COURT CAN HEAR AN ECAGWAYA OR TRADITIONAL ADOPTION ORDER

Also be aware that the adoption code requires that the child(ren) to be adopted must have been in the care of the adoptive parents for two (2) years or more before the adoptive parents can file the petition for an Ecagwaya or traditional adoption.

SECOND CAVEAT: THE ADOPTION CODE REQUIRES THAT TO USE OBTAIN AN ECAGWAYA OR TRADITIONAL ADOPTION, THE NATURAL PARENTS MUST HAVE PLACED THE CHILD(REN) WITH ADOPTIVE PARENTS WITHOUT COURT INVOLVEMENT

This means that in order to grant an Ecagwaya or traditional adoption, the natural parents must have voluntarily placed the child(ren) in the care of the adoptive parents without court involvement.

THIRD CAVEAT: THE TRADITIONAL ADOPTION MUST BE ATTESTED TO BY TWO (2) RELIABLE WITNESSES

The adoption code requires that the traditional adoption be attested by two reliable witnesses. The code does not say what the witnesses are to attest to. The Petitioner(s) will need to at least have two witnesses that can attest that they know the adoptive family and the adoptive child(ren) and that the child(ren) to be adopted have been in the care of the adoptive parents for two (2) years or more. They can attest to any other information pertinent to the adoption including the adoptive parents ability to care for and provide for the adoptive child(ren).

You will need to bring the two (2) reliable witness to the adoption hearing to testify. If you need to subpoena these two reliable witnesses to appear at the Ecagwaya or traditional adoption hearing, please use the **Motion to Subpoena Witness** form.

HOW TO START AN ECAGWAYA OR TRADITIONAL ADOPTION

An an Ecagwaya or traditional adoption is started by filing a petition for an an Ecagwaya or traditional adoption. The petitioner will need to fill in the necessary information with help from the instructions below and then file the forms with the appropriate court.

The **Petition for an Ecagwaya or traditional Adoption** form can be used if each child named

in the petition as the same natural mother and natural father. If there are other children to be adopted who have only one common natural parent a separate petition should be filed. If all the children to be adopted have the same natural parents (mother and father) then one petition needs to be filed. We tried to develop one petition form for children with multiple natural parents (different fathers or different mothers) but the form was too long and confusing to follow.

What is a petition. A petition is a document similar to a complaint except it does not require an answer from the respondent. It is a document where the petitioner is formally requesting the court to order something and sets out the petitioner's version of the facts. In this case the petitioner is petitioning the court to be allowed to adopt the child(ren). You can use the **Petition for an Ecagwaya or traditional Adoption** form. The form has the necessary information required by the tribal code to petition the court for adoption. The petitioner will need to prove the allegations in the petition for adoption at the adoption hearing.

How to file a petition. A petition is filed when you take it to the courthouse and file it along with the filing fee with the clerk of courts. When the petition is filed with the clerk, the petitioner will need to sign and date the form in front of the clerk so they can notarize the petitioner(s) signature.

The petitioner(s) can file the petition with the juvenile (Children's Court) division of the Rosebud Sioux Tribal Court which is housed at the Wanbli Wiconi Tipi (Juvenile Detention Center) located on Highway 18 between Rosebud Junction and Soldier Creek.

The petitioner should ask the clerk if you can file multiple petitions involving children with one different natural parent in one case to save on filing fee costs.

Filing and service fees. The court will require payment of a filing fee to file your petition with the court and a service fee to have the petition and notice of hearing served on the natural parents by the court process server, unless it is waived. If paying the fees would be a hardship the petitioner can use the **Motion to Waive Filing and Service Fees** form to ask the court to waive the filing fee or for a partial waiver of the fee. Alternatively, the petitioner(s) can opt to use a resident tribal member over the age of 18 and not a party to adoption serve the papers. This is set out in more detail below.

THE COURT WILL ORDER AN INVESTIGATION OF THE PETITION FOR ADOPTION

The court will order that a home-study be prepared. The court may order a Social Service Agency (either Tribal, BIA or State) to investigate the petition. The agency will make a careful and thorough investigation and prepare a home study to determine if petitioner(s) and their home is suitable for adopting the child(ren).

The agency report will determine if the child, the petitioner(s) and their home are appropriate for adoption. The court will use the report to determine if the adoption is in the best interest of the child(ren) being adopted.

NOTICE OF ADOPTION HEARING AND PERSONAL SERVICE ON PETITION FOR ADOPTION AND NOTICE OF HEARING ON THE NATURAL (BIOLOGICAL) PARENTS

After the adoption petition is filed and the home study and investigation by the Social Service Agency is completed, the court will schedule an adoption hearing. Notices of hearing along with the petition for adoption will be mailed to the prospective adoptive parents 10 days prior to hearing.

The adoption code requires that the natural parents be personally served with the petition for adoption and the notice of hearing. After the petition is filed and the home study is completed, the court will prepare a notice of hearing. The court process server will personally serve the natural parents with a copy of the petition and notice which requires a service fee unless you can get the service fee waived. The petitioner can have someone over the age of 18, who is a tribal member, resides on the reservation and who not a party to the adoption personally serve the natural parent with the petition and notice of hearing. Personal service means handing a copy of the petition and notice of hearing to the natural parent or if the natural parent cannot be conveniently located, then by delivering a copy of the petition and notice at the natural parent's dwelling to a member of the natural parent's family or household over the age of 14 years. The person serving the natural parent with the petition and notice of hearing must do so at least 10 days before the scheduled hearing. If the petitioner has someone other than the court process server to serve the petition and notice, the petitioner must have that person fill out the **Affidavit of Service** form. The petitioner(s) is responsible for ensuring the affidavit is filed with the court after the person who serves the papers on the natural parent executed the Affidavit of Service form.

If the person attempting to personally serve the petition and notice of hearing on the natural parent cannot locate the natural parent after reasonable diligent attempts to locate the natural parent are made can file an affidavit with the court to that affect. The petitioner(s) can have the person who attempts to serve the natural parent without success fill out the **Affidavit of Personal Service on Natural Parent Not Possible** form and file it with the court. If the court finds that the person attempting to personally serve the natural parent has made reasonably diligent attempts to locate the natural parent for personal service and those attempts have failed, the court will order the petitioner to serve the natural parent by mailing the petition and notice of hearing to the natural parent's last known mailing address by first class mail and also to either publish (at the petitioner's expense) the notice of hearing in a local paper or by posting the notice of hearing at conspicuous place at the Tribal Building and at the Tribal courthouse. The petitioner(s) will be responsible for the cost of such publication. The petitioner(s) will also have to prove to the court that the notice of hearing as published in the local newspaper. This can be done with an affidavit (a legal document stating that you did in fact publish the notice in that newspaper) the newspaper will prepare reflecting the notice was published. The newspaper will do an affidavit of publication if you request one. The petitioner(s) can use the **Affidavit of Mailing and Publishing of Notice** if the court orders the petitioner(s) to mail and publish the notice in the local paper. The petitioner(s) can use the **Affidavit of Mailing and Posting of Notice** if the court orders the petitioner(s) to mail and post the notice in conspicuous places at the Tribal

Building and at the Tribal courthouse.

APPEARANCES AT THE ECAGWAYA OR TRADITIONAL ADOPTION HEARING

The adoption code requires the adoptive parents, the child(ren) to be adopted and the spouse of the adoptive parent (commonly the natural parent of the child to be adopted who is married to the adoptive parent in a step-parent adoption must appear) to appear at the hearing on the petition for adoption and execute their consents to the adoption in the presence of the judge hearing the case.

The natural parents can appear at the hearing to either give their consent or to resist and object to the adoption. If either natural parent consent to the adoption and do not want to appear at the adoption hearing, that parent or both can execute a document called Consent to Adoption and Power of Attorney. This document allows the natural parent who does not wish to appear at the hearing the ability to consent to adoption and make their appearance in writing without being physically present at the hearing.

Also at the hearing, the proposed adoptive parents must execute an agreement with the court that the adoptive parents will treat the child to be adopted in all respects as a natural and lawful child should be treated. In other words, the adoptive parents agree with the court in writing that they will treat the adopted child(ren) as their natural child(ren). This means the adoptive parents will house, guide, support, feed, educate and treat the adoptive child as their own child.

EXAMINATION AND FINDINGS MADE AT THE HEARING BY THE COURT

The judge presiding over the adoption petition hearing is required to examine all persons appearing at the hearing and to examine all documents pertaining to the adoption including all notices and the home study prepared by the Social Service Agency appointed by the court to investigate the adoption petition and any recommendations to determine if the child is suitable for adoption and that the proposed adoptive parent is financially and morally qualified to provide the care and training of the adoptive child. The judge must satisfy themselves that it would be in the child's interest to be adopted.

The court will determine the rights of the natural parent(s) and adoptive parent(s). The court must further determine if it is in the child(ren)'s best interest whether the natural parents parental rights will be maintained or terminated.

Any natural parent who objects to the adoption has a due process right to object and introduce evidence and testimony that (1) the natural parent's parental rights have not been terminated by a court; (2) the natural parent has not been adjudged by a court of competent jurisdiction to be mentally incompetent or mentally ill; or (3) the natural parent has not abandoned their child(ren) for a consecutive period of one year from the date of filing the Petition for Adoption.

The petitioner(s) can prove (1) and (2) by introducing certified copies of the judgment for termination of parental rights or of mental incompetence or illness. (3) can be proven by testimony from the petitioner(s) and other witnesses that the parent(s) have had no contact with

or provided no support (financially or morally) for the child(ren) for a period of year from the date of filing the adoption petition.

BURDEN OF PROOF. In a typical adoption case the person(s) petitioning for adoption have the burden of proving their claim by a **Clear and Convincing Evidence**. This means that by representing themselves in adoption it is their responsibility to prove their case. Don't expect the judge to prove petitioner(s) case for petitioner(s). Proving something by clear and convincing evidence means proving the allegations in the petition with evidence that is highly and substantially more true than untrue. The petitioner has the burden of proving by clear and convincing evidence the following to the court:

1. Petitioner must show the court that it has jurisdiction over the child(ren) they are seeking to adopt. The court can hear a petition for adoption involving any Indian child whose domicile or actual residence is within the boundaries of the Rosebud Sioux Tribe Reservation or within Indian Country (trust land or communities) of the original boundaries of the reservation or where jurisdiction is conferred on the tribal court by the Federal Indian Child Welfare Act. The petitioner can prove the child is an Indian child with testimony from relatives or their own testimony and by introducing a tribal enrollment card or blood quantum calculation prepared by a tribal enrollment office. The petitioner can prove the child is domiciled on or resides on within the boundaries of the Rosebud Sioux Tribe Reservation with testimony and documents.

2. The child(ren) to be adopted have been in the care of the adoptive parent(s) for two (2) years or more.

3. The natural parents voluntarily placed the child(ren) in the care of the adoptive parents without court involvement.

4. The adoption code requires that the traditional adoption be attested by two reliable witnesses. The code does not say what the witnesses are to attest to. The Petitioner(s) will need to at least have two witnesses that can attest that they know the adoptive family and the adoptive child(ren) and that the child(ren) to be adopted have been in the care of the adoptive parents for two (2) years or more. They can attest to any other information pertinent to the adoption including the adoptive parents ability to care for and provide for the adoptive child(ren).

5. Consent of a child to be adopted is 12 years of age or older is required. The judge will ask such a child if they agree and consent to the adoption.

6. Consent of the child(ren)'s natural parents is required unless one of the following can be proven: (1) the natural parent's parental rights have been terminated by a court; (2) the natural parent has been adjudged by a court of competent jurisdiction to be mentally incompetent or mentally ill; or (3) the natural parent has abandoned their child(ren) for a consecutive period of one year from the date of filing the petition for adoption. (1) and (2) can be proved by introducing certified copies of the judgment for termination of parental rights or of mental incompetence or illness. (3) can be proven by testimony from petitioner(s) and other witnesses that the parent(s) have had no contact with or provided no support (financially or morally) for the

child(ren) for a period of year from the date of filing the adoption petition.

7. If both natural parents consent to the adoption or fail to appear at the hearing and object, the court will more than likely grant the adoption unless the court finds that the natural parents are deceased and left a will nominating another person guardian, the court will normally follow the deceased parents wishes if it is in the child(ren)'s best interest.

8. If either natural parent or both appear at the hearing and object to the adoption, the petitioner must show the court that the natural parent(s) either (1) had their parental rights terminated by a court; or (2) has been adjudged by a court of competent jurisdiction to be mentally incompetent or mentally ill; or (3) has abandoned their child(ren) for a consecutive period of one year from the date of filing the Petition for Adoption. (1) and (2) can be proved by introducing certified copies of the judgment for termination of parental rights or of mental incompetence or illness. (3) can be proven by testimony from petitioner(s) and other witnesses that the parent(s) have had no contact with or provided no support (financially or morally) for the child(ren) for a period of year from the date of filing the adoption petition.

How to Prove Abandonment by a Parent. The petitioner can prove the natural parent abandoned the child with testimony of witnesses that the parent(s) have had no contact with the child(ren) or provided no financial or moral support for the child(ren) for a period in excess of one year. Some courts have held that a parent who has mailed their children a birthday or Christmas card or gift has not abandoned their children. Other courts have held that this is abandonment. Regular contact by telephone, letters or in person contact would not constitute abandonment. Providing financial support by a parent would not constitute abandonment.

9. The court will order a Social Service Agency (either Tribal, BIA or State) to investigate the petition. The agency may prepare a home study to determine if the adoptive parent(s) and their home are suitable for adopting the child(ren) in named in the petition.

10. The judge must satisfy themselves that it would be in the child's interest to be adopted.

ENROLLMENT OF THE ADOPTED CHILD NOT AFFECTED BY ADOPTION

The adoption code specifically makes it clear that adoption does effect the adoptive child's qualifications and right to enrollment in the Rosebud Sioux Tribe but that the child's enrollment is based on only the natural parents blood quantum and not the adoptive parents. This means that any adopted child's enrollment eligibility is based on the child's natural parent's eligibility and not on the adoptive parent's enrollment eligibility.

DEFENDING AGAINST OR OBJECTING TO ECAGWAYA OR TRADITIONAL ADOPTION

If the natural parent is served with a Notice of Hearing or a Petition for Adoption either through the mail, notice in the newspaper or by a process server, they do not have to file an answer or counterclaim. But if a natural parent objects to the petition they need to appear at the scheduled

hearing and voice their objection to the adoption. If the natural parent fails to do so they may waive their right to object later. The petition will tell you what the petitioner who wants to adopt your child(ren) has to prove in order for the Court to grant their request.

The petition the natural parent is served with will tell the natural parent why their consent is not required. The petitioner will be required to prove why the natural parent's consent isn't required. If the natural parent does not consent the adoption and appears at the adoption hearing they should be prepared to rebut any allegation of the petitioner(s) which would include (1) the natural parent's parental rights have been terminated by a court; (2) the natural parent has been adjudged by a court of competent jurisdiction to be mentally incompetent or mentally ill; or (3) the natural parent has abandoned their child(ren) for a consecutive period of one year from the date of filing the petition for adoption.

The natural parent who objects and does not consent to the adoption has a due process right to appear at the adoption hearing to object to the adoption and introduce evidence and testimony that (1) the natural parent's parental rights have not been terminated by a court; (2) the natural parent has not been adjudged by a court of competent jurisdiction to be mentally incompetent or mentally ill; or (3) the natural parent has not abandoned their child(ren) for a consecutive period of one year from the date of filing the Petition for Adoption.

How to Disprove the Natural Parent Abandonment by a Parent. The natural parent can rebut the petitioner's allegation that they abandoned the child with testimony of witnesses that the parent(s) have had contact with the child(ren) or provided financial or moral support for the child(ren) within the last year. Some courts have held that a parent who has mailed their children a birthday or Christmas card or gift has not abandoned their children. Other courts have held that this is abandonment. Regular contact by telephone, letters or in person contact would not constitute abandonment. Providing financial support by a parent would not constitute abandonment.

If the natural parent(s) want to maintain some parental rights, the natural parent(s) will need to prove to the court that it is in the child(ren)'s best interest that you retain some parental rights.